IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 25.06.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.467 of 2001

M.N.Thangaraj .. Appellant/Complainant

vs.

1.Sri Venkatachalapthi Tex,
rep by its Partner V.S.Gopal,
MGR Street, Veerappanchatra,
Erode-4.

2.V.S.Gopal .. Respondents/A1 & A2

Prayer: This Appeal has been preferred against the judgment dated 23.04.2001 made in Crl.A.No.6 of 2001 passed by the II additional Sessions Judge, Erode, reversing the judgment in C.C.No.42 of 1998 on the file of the Judicial Magistrate No.I, Erode, dated 05.12.2000.

For Appellant : Mr.N.Manokaran

For Respondents : Mr.S.Kalyanaraman for R1 & R2
(Legal Aid Counsel)

JUDGMENT

This appeal has been preferred against the Judgment in C.A.No.6 of 2001 on the file of the II Additional Sessions Judge, Erode, which had arisen out of the findings in C.C.No.42 of 1998 on the file of the Judicial Magistrate No.I, Erode. The complainant had filed a private complaint under Section 200 of Cr.P.C., against the accused 1 to 3 for an offence under Section 138 of the Negotiable Instruments Act.

2.The learned Judicial Magistrate, after taking cognizance of the offence, has issued summons to the accused and on their appearance, copies under Section 207 of Cr.P.C., were furnished to the accused and when the offence was explained to the accused and questioned they pleaded not

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guilty.

3.On the side of the complainant P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.12 were marked.

4.P.W.1 is the complainant. According to P.W.1, on 13.4.1997 A2-V.S.Gopal had borrowed Rs.1,00,000/- from him and in order to discharge the said loan, he(A2) had drawn a cheque dated 13.5.1997 for Rs.1,00,000/-. Ex.P.1 is the said cheque drawn by the accused in favour of the complainant dated 13.5.1997. When the said cheque was presented in the bank for collection on 29.10.1997 the said cheque was returned with an endorsement 'the account of the accused was closed'. According to P.W.1, the date of the cheque has been corrected from 13.5.1997 to 27.10.1997 by the accused and the said correction was also endorsed by the accused. Ex.P.2 is the returned memo sent along with the impugned cheque by the bank. The complainant had issued a notice under the original of Ex.P.3 dated 10.11.1997. The said notice was refused by A2-Gopal. A1 and A3 have received the notice. Ex.P.4 is the returned cover. Ex.P.5 is the acknowledgment for the notice having been received by A1. Ex.P.6 is the acknowledgment for A3 having been received the original of Ex.P.3-notice. Ex.P.7 is the reply notice sent by A3. Ex.P.8 to Ex.P.10 are the postal receipts.

5.P.W.2 is Senior Manager of Dhanalakshmi Bank, wherein the complainant is having his account. According to P.W.2, the impugned cheque-Ex.P.1 was tendered by the complainant on 29.10.1997 for collection and the said cheque was forwarded to Bank of Baroda, wherein the accused is having his account. Bank of Baroda has dishonoured the cheque. Ex.P.11 is the statement of accounts for the complainant.

6.P.W.3 is the Manger of the Bank of Baroda, Erode Branch. According to him, Ex.P.1-cheque was sent for collection, but the said cheque was returned with an endorsement that there is no sufficient funds in the drawer's account. Ex.P.2 is the returned memo and Ex.P.12 is the statement of accounts for the accused.

7.When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., they denied their complicity with the crime. The accused has examined D.W.1 to D.W.5 on their side and exhibited Ex.D.1 to Ex.D.4.

8.The learned trial Judge, after going through the evidence both oral and documentary let in by both the parties meticulously, has come to the conclusion that A1 & A2 are

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liable to be convicted under Section 138 r/w 142 of the Negotiable Instruments Act and accordingly, convicted A1 and A2 under Section 138 r/w 148 of the Negotiable Instruments Act and sentenced A1 to pay a fine of Rs.5,000/- with default sentence and sentenced A2 to undergo six months RI and a fine of Rs.5,000/- with default sentence and has also awarded compensation of Rs.2,500/- to the complainant from out of the fine amount imposed on A2 under Section 357(1) of Cr.P.C and has acquitted A3 under Section 255(1) of Cr.P.C., holding that A3 is not guilty under Section 138 r/w 142 of the Negotiable Instruments Act.

9.Aggrieved by the findings of the learned trial Judge, A1 and A2 preferred an appeal in C.A.No.6 of 2001 before the II Additional Sessions Judge, Erode, who after giving due deliberations to the submissions made by the learned counsel for the appellants as well as for the respondent and after scanning the evidence, has come to the conclusion that the complainant has miserably failed to prove the guilt against the accused and ultimately allowed the appeal, thereby setting aside the findings of the learned trial Judge, which necessitated the complainant to prefer this appeal.

10.Now the point for determination in this appeal is whether the findings of the learned II Additional Sessions Judge, Erode, in C.A.No.6 of 2001 is perverse in nature to warrant interference from this Court?

11.The Point:-

11(a)The first ground on which the learned first appellate Judge has acquitted the accused is that the complainant has failed to prove that the correction in the date in the impugned cheque-Ex.P.1 was made only by A2. The reasoning for arriving at such a conclusion by the learned first appellate Judge is that A2 has denied in his deposition to the effect that he has not made any endorsement in the correction made in the date in Ex.P.1-cheque. But a perusal of Ex.P.1-cheque will go to show that the date in Ex.P.1 has been corrected from 13.5.1997 to 27.10.1997 and it has been endorsed by A2-V.S.Gopal. A mere comparison of the signature of the said endorsement and admitted signature of A2 in the cheque will clearly go to show that both the signatures have been made by one and the same person. Mere denial in the deposition of A2-Gopal (D.W.4) is not sufficient to derive us to a conclusion that the endorsement in the correction in the date is not that of A2. Apart from the *ipsi-dixit* of D.W.4, there is no expert opinion available in this case on the side

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of the accused to show that the signature in the endorsement i.e., in the correction of the date, does not belong to A2-Gopal. This point has been elaborately discussed by the learned trial Judge at para 12 of his Judgment. The learned trial Judge has observed that A2 has not taken any steps to sent Ex.P.1 to a hand writing expert to get his opinion to show that the signature in the endorsement in Ex.P.1 for the correction of the date does not belong to A2 by comparing the same with the admitted signature of A2 in Ex.P.1 itself.

11(b)The defence taken in this case on the side of the accused is that some of the signed cheques kept in their office were stolen away by the complainant and that from one of the stolen cheques the present cheque has been forged by the complainant. In this connection the accused had preferred a complaint under Ex.D.3 & Ex.D.4. But both in Ex.D.3 & Ex.D.4, there is no mention about Ex.P.1-cheque. The cheque number of the impugned cheque does not find a place neither in Ex.D.3 nor in Ex.D.4. The learned trial Judge at para 14 of his judgment has discussed about this and has come to the correct conclusion that the defence taken by the accused that the complainant has forged the cheque alleged to have been stolen from his custody cannot be believed.

11(c) The third point on which the learned first appellant Judge has dismissed the complaint is that in Ex.D.1, the accused had given all details about his creditors, but the name of the complainant does not find a place, so it will go to show that on the date of Ex.D.1, the complainant is not a creditor because no cheque was drawn in favour of the complainant by A2. This contention of the accused was totally accepted by the learned first appellate Judge without considering the fact that the complainant is not a party to Ex.D.1. Ex.D.1 was entered into between the accused and six persons viz. V.S.Ponnusamy, M.Thangamuthu, S.A.Natarajan, P.Thangavel, Palanisamy and Dharmalingam. Further Ex.D.1 is dated 5.9.1997, whereas the impugned cheque Ex.P.1 is originally dated 13.5.1997. Even in the complaint, the complainant has stated that A2 had borrowed a sum of Rs.1,00,000/- from the complainant on 13.5.1997 and had drawn the impugned cheque dated 13.5.1997 and requested the complainant to present the cheque only on 27.10.1997 and also made necessary correction to that effect in the date in Ex.P.1-cheque.

11(d) The submission made by the learned counsel appearing for the appellant is that there is no valid service of notice as contemplated under Section 138(b) of the Negotiable Instruments Act. The learned counsel would contend

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that the postal endorsement on Ex.P.4-returned cover shows that intimation was given on 24.11.1997 to A2-V.S.Gopal. But it was returned to the sender with an endorsement 'not claimed'. The learned counsel would contend that the return of the notice to the sender with an endorsement 'not claimed' will not amount to due service of notice to the accused. But this contention cannot be upheld because as per the ratio in 1999(7) SCC 510 (K.Bhaskaran Vs. Sankaran Vaidhyan Balan and another), that on mere endorsement on the postal cover 'unclaimed' it cannot be presumed that there was no valid service of notice under Section 27 of the General Clauses Act. It is to be presumed that like ordinary post there was a valid service of notice on the addressee. In this case from a perusal of Ex.P.4-returned postal cover it is seen that intimation was given on 24.11.1997 itself. But the addressee/accused has not claimed the said registered post within one week from the date of intimation. Only under such circumstance, the said registered post Ex.P.4 was returned to the sender with an endorsement 'unclaimed' on 1.12.1997. Under such circumstance, it cannot be said that there was no valid service of notice as contemplated under Section 138(b) of the Negotiable Instruments Act. So viewed from any angle the findings of the learned first Appellate Judge in C.A.No.6 of 2001 on the file of the II Additional Sessions Judge, Erode, is, in my opinion, perverse in nature requires interference from this Court and accordingly the appeal is allowed setting aside the judgment in C.A.No.6 of 2001 on the file the II Additional Sessions Judge, Erode.

11(e) Then coming to the question of sentence following the dictum in 2004(2) SCC 235 (Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza), wherein it has been held as follows:-

> "We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the NI Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the

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offence under Section 138 of the Act.

The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

Ultimately the Honourable Apex Court has awarded a sum of Rs.80,000/- (twice the amount of the cheque) as compensation with default sentence."

I am of the opinion that the same yardstick can be applied to the present facts of the case also while awarding sentence. Point is answered accordingly.

12. In fine, the appeal is allowed and the judgment in C.A.No.6 of 2001 on the file of the II Additional Sessions Judge, Erode, is set aside and the accused 1 & 2 are convicted under Section 138 of the Negotiable Instruments Act and a months time is granted from this date to the accused 1 & 2 / respondents herein to pay a sum of Rs.2,00,000/- (Rupees Two Lakhs) only (twice the cheque amount) to the complainant, in default the 2nd respondent herein shall suffer Simple Imprisonment for 6 months.

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The services rendered by Mr.S.Kalayanraman, Legal Aid Counsel, for respondents is recorded with appreciation. The Member Secretary, Tamil Nadu Legal Services Authority, is hereby directed to pay a sum of Rs.3,000/- (Rupees Three Thousand) only to Mr.S.Kalayanaraman towards his remuneration.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ssv

To

1.The II Additional Sessions Judge, Erode.
2.-do- thro' The Principal Sessions Judge, Erode
3.The Judicial Magistrate No.I, Erode.
4.-do- thro' The Chief Judicial Magistrate, Erode.
5.The Member Secretary,
Tamil Nadu Legal Services Authority,
High Court Campus, Chennai-104.

+1cc to Mr.S.Kalayanaraman, Advocate Sr 37231
+1cc to Mr. N.Manokaran,Advocate Sr 37465

NG (CO)
km/12.7.

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